



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
PARALLAX HEALTH SCIENCES, INC.,

Plaintiff,

- against -

EMA FINANCIAL, LLC,

Defendant.
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20-CV-2375 (LGS) (RWL)

**ORDER MODIFYING
REPORT AND RECOMMENDATION**

ROBERT W. LEHRBURGER, United States Magistrate Judge.

On February 24, 2022, I issued a Report and Recommendation concerning Plaintiff's motion to vacate default judgment. (Dkt. 115, "R&R.") The time to object to that Report and Recommendation expired on or about March 10, 2022. Neither party filed objections. The District Court Judge has not yet acted on the R&R.

On March 15, 2022, the Second Circuit Court of Appeals issued a decision in *Adar Bays, LLC v. GeneSYS ID, Inc.*, 2022 WL 774514 (2d Cir. March 15, 2022). In that case, the Second Circuit set forth answers provided by the New York Court of Appeals in response to two certified questions of New York law. As relevant here, the New York Court of Appeals held that "in assessing whether the interest on a given loan has exceeded the statutory usury cap, the value of floating-price convertible options should be included in determination of interest." 2022 WL 774514 at *2 (quoting *Adar Bays, LLC v. GeneSYS ID, Inc.*, 37 N.Y.3d 320, 334 (2021)).

The R&R concluded, in part, that the debt instruments at issue were not usurious because the applicable law is that of Nevada, where usury is not a defense to enforcement. (R&R at 25.) In dicta, following a consistent line of case law, the R&R also

concluded that the notes at issue, which included convertible option rights, were not usurious under New York law. That dicta may no longer be correct in view of *Adar Bays*. Accordingly, the Court withdraws that section of the R&R, specifically page 26 (paragraph beginning with “Second, even if New York law did apply ...”) to page 27 (end of first full paragraph).

The remainder of the R&R remains as is and unaffected by *Adar Bays*.

SO ORDERED.

A handwritten signature in black ink, appearing to read 'R. Lehrburger', with a long horizontal stroke extending to the right.

ROBERT W. LEHRBURGER
UNITED STATES MAGISTRATE JUDGE

Dated: March 16, 2022
New York, New York

Copies transmitted this date to all counsel of record.